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CITATIONS

Cases:

274-159—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 21

OSWALD ZSCHERNIG, ET AL., APPELLANTS

v.

WILLIAM J. MILLER, ADMINISTRATOR, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (R. 14–34) is reported at 243 Or. 567, 412 P. 2d 781, rehearing denied, 415 P. 2d 15. The opinion, findings and order of the Circuit Court of Multnomah County, Oregon (R. 9–13) are unreported.

JURISDICTION

The opinion and order (R. 34–35) of the Supreme Court of Oregon were issued on March 23, 1966, and a petition for rehearing was denied on June 3, 1966 (R. 35–36). Notice of appeal to this Court was filed on August 31, 1966 (R. 37–39).

On January 9, 1967, this Court invited the Solicitor General to file a brief expressing the views of the United States (385 U.S. 998). Probable jurisdiction was noted on May 8, 1967 (R. 40) (386 U.S. 1030). The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany confers upon nationals of one of the signatories the right to succeed to personal property located in the other country regardless of the nationality of the decedent.

STATUTE AND TREATY INVOLVED

The relevant provisions of the Oregon Revised Statutes, and the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany are set forth in Appendix A, *infra*, pp. 16–17.

STATEMENT

Pauline Schrader, a resident of Oregon, died in that State on September 30, 1962, leaving an estate consisting of real and personal property located in Oregon. She was intestate and her sole heirs were appellants, residents of the Soviet Zone of Germany (East Germany). Acting pursuant to Section 111.070 of the Oregon Revised Statutes, appellee State Land Board of Oregon filed a petition in the probate department of the Circuit Court of Multnomah County for the escheat of the decedent's estate. Thereafter, appellants filed in that court a petition to determine their heir-

ship and to obtain distribution of the estate (R. 1–9).

Following a hearing, the circuit court found, among other things, that the evidence before it "did not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the German Democratic Republic of East Germany at the date of death of Pauline Schrader" (R. 12).[1] Accordingly, the court ordered that all property of the estate escheat to Oregon (R. 13).

The Supreme Court of Oregon modified that order of escheat so as to apply only to the decedent's personal property (R. 34–35). The court ruled that the right of residents of East Germany to inherit real property situated in the United States was guaranteed by Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, *infra*, p. 17, and that the Oregon statute could not therefore, operate to bar the right of appellants to inherit the realty (R. 31). The court concluded that Article IV survived World War II and was not affected by the 1954 Treaty of Friendship, Commerce and Navi-

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[1] The Oregon statute conditions a non-resident alien's right to inherit property in Oregon upon (a) the existence of a reciprocal right of American citizens to inherit upon the same terms and conditions as citizens of the country of which the alien heir is an inhabitant or citizen, (b) the right of American citizens to receive payments within the United States from the estates of decedents dying within such foreign country, and (c) proof that the alien heirs of the American decedent will receive the benefit, use or control of their inheritance without confiscation. The statute places the burden on the alien heir to prove that all of the conditions are met. If these conditions are not satisfied, and there are no other heirs, the property is to escheat to the State. See Appendix A *infra* pp. 16–17.

gation with the Federal Republic of Germany (West Germany), 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956) (R. 19–28).

As to the personal property, however, the Supreme Court of Oregon held, relying on *Clark* v. *Allen,* 331 U.S. 503, that Article IV of the 1923 Treaty did not cover "personal property located in this country which an American national undertakes to leave to German nationals" (R. 30).[2] It thus concluded that the circuit court had correctly applied the provisions of Oregon Revised Statutes Section 111.070 with respect to the decendent's personalty (R. 30). It also ruled that the Oregon statute was not "an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States" (R. 30–31).

INTRODUCTION AND SUMMARY OF ARGUMENT

From the foregoing Statement, it is apparent that the disposition of this case will necessarily involve the interpretation of Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany. While this particular treaty now applies only to the Soviet Zone of Germany (having been superseded as to the Federal Republic of Germany by a 1954 Treaty), identical provisions are contained in six other treaties to which the United States is a party,[3] and similar provisions are contained in four

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[2] The Oregon court presumed, in the absence of a showing to the contrary, that the decedent was a United States citizen at the time of her death (R. 30, note 5).

[3] Treaty of Friendship, Commerce and Consular Rights with Austria, 47 Stat. 1876, TS 838, Art. IV (1928); Treaty of Friendship, Commerce and Consular Rights with Estonia, 44

other treaties presently in force.[4] In *Clark* v. *Allen*, 331 U.S. 503, this Court, although it recognized that the 1923 Treaty gave German nationals the right to inherit real property regardless of the nationality of the decedent; however the Court construed the personal property provision at issue here to give German nationals the right to inherit personal property from German nationals residing in this country but not from United States citizens. We urge a more liberal construction—one which would permit German nationals to inherit personal property regardless of the citizenship of the decedent and would avoid discrimination in the disposition of decendents' property against foreign nationals whose rights are secured under this or similar treaties. We believe that there is no sound basis for assuming that the drafters of the treaty intended to distinguish between the right to inherit real property and the right to inherit personal property, and that the history of the provision in issue points to the conclusion that the drafters did not intend such a result. We also

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Stat. 2379, TS 736, Art. IV (1925); Convention relating to the Tenure and Disposition of Real and Personal Property with Guatemala, 32 Stat. 1944, TS 412, Art. II (1901); Treaty of Friendship, Commerce and Consular Rights with Honduras, 45 Stat. 2618, TS 764, Art. IV (1927); Treaty of Friendship, Commerce and Consular Rights with Latvia, 45 Stat. 2641, TS 765, Art. IV (1928); and Treaty of Friendship and General Relations with Spain, 33 Stat. 2105, TS 422, Art. III (1902).

[4] Treaty of Peace, Friendship, Commerce and Navigation with Bolivia, 12 Stat. 1003, TS 32, Art. XII (1858); Treaty of Peace, Amity, Navigation, and Commerce with Colombia (then New Granada), 9 Stat. 881, TS 54, Art. XII (1846); Consular Convention with Sweden, 37 Stat. 1479, TS 557, Art. XIV (1910); and Convention of Friendship, Commerce and Extradition with Switzerland, 11 Stat. 587, TS 353, Art. V (1850).

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contend that there is no reason to assume that the drafters of this treaty intended to adopt the narrow construction of this provision found in this Court's opinion in *Frederickson* v. *Louisiana*, 23 How. 445. Thus, the provision in question should be interpreted in accordance with the generally accepted principle that treaties of friendship and commerce should be construed to avoid injurious discrimination in either country against the citizens of the other.

ARGUMENT

The 1923 Treaty gives nationals of either country the right to inherit personal property regardless of the nationality of the decedent

There is no question that the decision of the Supreme Court of Oregon is in accord with this Court's decision in *Clark* v. *Allen*, 331 U.S. 503. It is the position of the United States, however, that, with regard to the construction of the personal property clause of the treaty in issue, *Clark* v. *Allen* was incorrectly decided and should be overruled.[5]

The treaty at issue here and in *Clark* v. *Allen* treats the disposition at death of real and personal property in separate provisions. Thus, the treaty provides (see App. A, *infra*, p. 17):

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Con-

[5] The government does not challenge the Court's holdings in *Clark* v. *Allen*, that the Treaty of 1923 is still in force, and that State escheat statutes, such as the Oregon statute, can not be enforced if the foreign national's rights are guaranteed by treaty. Nor does the government contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.

tracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

We agree with the Court's determination in *Clark* v. *Allen* that the provision dealing with real property gives German heirs the right to inherit realty from "'any person' holding realty in the United States" (331

U.S. at 508). However, we question the distinction, drawn in *Clark* v. *Allen,* between the right to inherit real property and the right to inherit personal property. Indeed, we perceive no reason why the drafters of this treaty would have desired to adopt a rule which permits a foreign national to inherit from an American citizen who died possessed of realty, but denies the foreign national the right to inherit if prior to his death the citizen sold the realty and retained the cash proceeds of that sale. The anomaly of such a construction is even more striking when it is recognized that the treaty does not give the foreign national the right to take title to the realty but rather permits him to have the realty sold and to obtain the proceeds of the sale.

We suggest that the history of this provision,[6] which was presented to the Court in detail by the government's brief in *Clark* v. *Allen* (reproduced as Appendix B, *infra*), supports the conclusion that the drafters of this provision had no such distinction in mind.

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[6] Article IV of the 1923 Treaty is based upon Article X of the 1785 Treaty with Prussia (8 Stat. 84, 88). Article X appears as Article X of the Renewal Treaty of July 11, 1799 (8 Stat. 162, 166) and was again copied as Article XIV of the Treaty of May 1, 1828 (8 Stat. 378, 384). At the time of the ratification of the 1923 Treaty, Secretary of State Hughes wrote to Senator Lodge, Chairman of the Senate Committee on Foreign Relations, that:

"Comment regarding Article IV of the new draft is believed to be unnecessary except to call attention to the similarity of this Article to Article XIV of the Treaty with Prussia [of May 1, 1828]."

Letter dated January 17, 1924, Dept. State File 711.622/36, MSS., Nat'l. Archives.

At common law, aliens could freely inherit personal property, but were not entitled to hold or to succeed to real estate. 1 Blackstone, *Commentaries* 372; 2 Kent, *Commentaries* 61–63. Because the United States did not wish to abrogate the common-law rule that aliens could not hold title to real property, but was willing to grant alien heirs the right to have real property in an estate sold and to obtain the proceeds of that sale, it was necessary to treat the disposition of real property in a provision separate from the provision dealing with personal property. See Appendix B, *infra,* pp. 21–22.

Since there was no common-law rule preventing aliens from succeeding to personal property, that provision of the treaty was drawn with an eye to the substantial restrictions, existing in many of the civil law countries, upon an alien's right to dispose of, or to inherit, property of any kind. The *droit d'aubaine* was the feudal right of the sovereign to appropriate all the property of an alien dying, either testate or intestate, within the realm. An aspect of this doctrine was "the complementary incapacity of an alien to inherit, even from a citizen." *Nielsen* v. *Johnson,* 279 U.S. 47, 55, note 2. See also III Vattel, *The Law of Nations* 112; Wheaton, *Elements of International Law* (1866 ed.) 82. The *droit d'aubaine* was replaced during the 18th century by the *droit de détraction,* a tax "imposed on the right of an alien to acquire by inheritance (testate or intestate) the property of persons dying within the realm." *Nielsen* v. *Johnson, supra,* at 56, n. 2. The tax was levied upon the removal of property inherited by an alien from the country of

which the decendent was a citizen. Borchard, *Diplomatic Protection of Citizens Abroad* (1915 ed.) 39.[7]

The personal property provision of Article VI of the treaty in issue was originally drafted with a view to relieving citizens of the contracting countries from the onerous burdens of the *droit d'aubaine* and the *droit de detraction*. Thus, in order clearly to prohibit the application of the *droit d'aubaine*, by which the sovereign could appropriate the property of a deceased alien, the provision in issue provides that "[n]ationals of either High Contracting Party may have full power to dispose of their personal property * * * by testament, donation, or otherwise." Then, in order to protect against the enforcement of the *droit de detraction's* discriminatory taxation of the inheritance of an alien, the provision continues: "their heirs, legatees and donees, of whatsoever nationality * * * shall succeed to such personal property * * * subject to the payment of such duties * * * only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases." Since the two clauses served different functions, there is no reason to limit the second clause to cases encompassed by the first.

We find nothing in the relevant history to indicate that the drafters intended to withhold from foreign nationals the right to inherit personal prop-

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[7] According to Borchard, "[t]he power to acquire, own and dispose of personal property" was "a universally recognized right of aliens," often guaranteed by treaty provisions similar to the one here involved. *Ibid.* See also II Hyde, *International Law* (2d revised ed.), pp. 22–29.

erty from citizens, or to suggest that there was any intent to distinguish between the right to succeed to real and personal property. Indeed, as is documented in the government's brief in *Clark* v. *Allen, infra,* pp. 23–30, those who drafted the treaties which originally incorporated this provision assumed that they were assuring foreign nationals the right to inherit real or personal property from any person dying in this country. Thus it is apparent that the word "their" before "heirs" in the second clause of the personal property provision was meant to refer to "Nationals of either High Contracting Party"[8] and that the word "such" before "personal property" in the same clause refers to "personal property of every kind."[8]

In *Clark* v. *Allen* the Court acknowledged that the "history of the clause * * * bears out the construction that it grants the foreign heir the right to succeed to his inheritance * * *." 331 U.S. at 515. However, that construction was rejected on the basis of the 1860 decision in *Frederickson* v. *Louisiana,* 23 How. 445, in which the Court had construed an identical pro-

[8] As noted above, the full provision reads:

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

vision in the Treaty of 1844 with Wurttemburg (8 Stat. 588) as not giving foreign heirs the right to inherit personal property from United States citizens, and three 1917 cases which had followed *Frederickson-Peterson* v. *Iowa*, 245 U.S. 170; *Duus* v. *Brown*, 245 U.S. 176; *Skarderud* v. *Tax Commission*, 245 U.S. 633.* The Court, in *Clark* v. *Allen*, reasoned that "the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter." 331 U.S. at 516.

Implicit in the Court's reasoning were the assumptions (1) that the drafters of the provisions in question were aware of the decision in *Frederickson* v. *Louisiana, and* (2) that they construed *Frederickson* as barring foreign nationals from inheriting personal property from United States citizens under the treaty in question. We submit that both of those assumptions are doubtful.

As to the first, it should be noted that in 1895 the British Ambassador in Washington initiated correspondence with the State Department proposing a treaty which would give citizens of each country reciprocal rights to the inheritance of "real or personal" property. The treaty that was subsequently adopted contained a provision dealing with personal property almost identical with the Wurttemberg Treaty. Thus, it seems that the drafters of that treaty were not cognizant of the *Frederickson* decision. See Appendix B *infra*, pp. 37–41.

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* Although these cases followed *Frederickson*, they did not involve identically worded treaty provisions.

In addition, the *Frederickson* decision could conceivably have been construed by the drafters of the 1923 German Treaty as not being applicable to the treaty which they drafted. The Court in *Frederickson* was concerned solely with the article of the Wurttemberg Treaty dealing with personal property; the provision dealing with real property was not brought to the Court's attention. As a result, the Court in *Frederickson* based its decision that foreign nationals had no right to inherit personal property from United States citizens on its understanding that (23 How. 447–448):

> * * * The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, *was not in the contemplation of the contracting Powers,* and is not braced in this article of the treaty. * * * [Emphasis added.]

Since the provision dealing with real property in the Wurttemberg Treaty (which was identical to the one in the treaty in issue here) accorded the nationals of either country the right to inherit the real property "of 'any person' holding realty in the United States" (see *Clark* v. *Allen,* 331 U.S. at 508), the Court in *Frederickson* was clearly in error in concluding that "the case of a citizen * * * residing at home and disposing of property * * * was not in the contemplation of the contracting Powers * * *." The Court, in *Frederickson,* did not realize that it was creating a distinction between the right to inherit real property and the right to inherit personal property.

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Just as the Court in *Frederickson* was misled by not having the full treaty before it, the drafters of the treaty here in issue could have been misled by a failure to realize that the treaty involved in *Frederickson* did contain provisions pertaining to both real and personal property. Thus, the drafters of the treaty at issue here might have concluded that because the real property provision did affirmatively show that the case of a citizen at home disposing of his property was "in the contemplation of the contracting Powers," the personal property clause would not be governed by the reasoning of *Frederickson.*

No analysis of the history of the 1923 Treaty can definitively determine whether the drafters considered *Frederickson* or how they construed it. We do urge, however, that the above analysis does at least cast considerable doubt on the assumption that they thought or intended that the provision here in issue would be controlled by *Frederickson.* In these circumstances, we suggest that the Court should not consider itself bound to follow *Frederickson* and to reject the settled principle that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp.* v. *Domenech,* 311 U.S. 150, 163, citing *Jordon* v. *Tashiro,* 278 U.S. 123, 127; *Nielsen* v. *Johnson,* 279 U.S. 47, 52.

The introduction to the treaty in issue here states the purpose of the contracting powers "to promote friendly intercourse * * * through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof" (44 Stat.

2132). A construction of that treaty which permits the States to discriminate against foreign nationals in regard to their right to inherit personal property from United States citizens seems clearly at odds with that purpose. See *Todok* v. *Union State Bank,* 281 U.S. 449, 455. "It is not in such a niggardly fashion that treaties designed to promote the freest kind of traffic, communications and associations among nations and their nationals should be interpreted * * *." *Kolovrat* v. *Oregon,* 366 U.S. 187, 194.[10]

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the Supreme Court of the State of Oregon should be reversed in so far as it determined that appellants were not decedent's heirs at law with respect to her personal property.

THURGOOD MARSHALL,
Solicitor General,
CARL EARDLEY,
Acting Assistant Attorney General,
JOHN S. MARTIN, JR.,
Assistant to the Solicitor General,
ALAN S. ROSENTHAL,
HOWARD J. KASHNER,
Attorneys.

AUGUST 1967.

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[10] If the Court concludes that the 1923 Treaty gives appellants the right to inherit the personal property, it need not consider any of appellants' constitutional challenges to Oregon Revised Statutes, Section 111.070 (R. 38–39). In the event that the Court considers those challenges, we note here, as observed above, see note 5, *supra,* that the government does not contend that the application of Oregon Revised Statutes, Section 111.070 to the facts of this case constitutes an undue interference with the conduct of the foreign relations of the United States.

APPENDIX A

STATUTE AND TREATY INVOLVED

1. Section 111.070 of the Oregon Revised Statutes provides as follows:

> (1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:
>
> (a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;
>
> (b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and
>
> (c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.
>
> (2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.
>
> (3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such

property, the property shall be disposed of as escheated property.

2. Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, proclaimed October 14, 1925, 44 Stat. 2132, 2135, T.S. No. 725, provides as follows:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

APPENDIX B

Pp. 39–67 of the Brief For The Petitioner in *Clark* v. *Allen*, 331 U.S. 503.

1. *History of the treaty clause prior to Frederickson* v. *Louisiana.*—Together with a large number of other treaties, the instant treaty is based on Article X of the treaty of 1785 with Prussia. See n. 17, *supra.* The Prussian treaty, in turn, evolved from the earlier treaties of amity and commerce with France, The Netherlands and Sweden. The diplomatic correspondence for all of these treaties shows that the reciprocal inheritance clause now before the Court has always been understood as providing for inheritance rights without regard to the citizenship of the decedent. In view of the relationship of the instant treaty to these earlier treaties, this evidence may be relied upon here. *Nielsen* v. *Johnson,* 279 U.S. 47, 52; *Factor* v. *Laubenheimer,* 290 U.S. 276, 294–95 *In re Ross,* 140 U.S. 453, 467; *Perkins* v. *Elg,* 307 U.S. 325, 335; *Wildenhus's Case,* 120 U.S. 1.

a. *The treaties with France, The Netherlands and Sweden.* Our first treaty of amity and commerce, that of February 6, 1778, with France, contained a clause directed specifically at the *droit d'aubaine* and the *droit de detraction.* Art. XI, 8 Stat. 12, 18.[25] In our second and third

[25] "The subjects and inhabitants of the said United States, or any one of them, shall not be reputed aubains in France, and consequently shall be exempted from the *droit d'aubaine* or other similar duty under what name soever. They may by testament, donation, or otherwise, dispose of their goods moveable and immoveable in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab*

treaties of amity and commerce, with The Netherlands and Sweden, a more general clause, closer in phraseology to the personalty clause of the later treaty with Prussia, provided for the inheritance of both real [26] and personal property, without qualification. Art. VI, Treaty of October 8, 1782, with The Netherlands (8

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intestat, without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogatives of provinces, cities, or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called droit de detraction or other duty of the same kind, * * * The subjects of the most Christian King shall enjoy on their part in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article."

[26] These treaties used the words "effects" and "goods," which have been held to include realty. *Todok* v. *Union State Bank*, 281 U.S. 449; *University* v. *Miller*, 14 N.C. 188; *Adams* v. *Akerlund*, 168 Ill. 632; *Contra: Johnson* v. *Olson*, 92 Kan. 819; *Succession of Sala*, 50 La. Ann. 1009. See 2 Miller, *Treaties, etc.* 150.

On the ground, *inter alia*, that the inclusion of real property would encroach on the powers of the States, it was proposed in the Congress to limit the treaty with The Netherlands to personalty. XXII Journals of the Continental Congress (1914) 374, 375–376, 393–396. While the proposal was voted down, the committee of the Congress which recommended ratification of the treaty was pleased that the final form of the treaty used the term "effects" rather than the explicit language "goods, moveable or immoveable". The committee apparently hoped that "effects" would not be taken to include realty. XXIV *ibid.* (1922) 64, 65. See 1 Curtis, *Constitutional History of the United States* (1889) 188–190. A proposal to limit the treaty with Sweden to personalty was also made. The grounds do not appear and the proposal was either voted down or otherwise abandoned. XXIII Journals of the Continental Congress (1914) 622, 623.

scope of the treaty-making power of the Confederation [29] the Continental Congress, however, instructed its Commissioners, Franklin, Jefferson and Adams (XXVI Journals of the Continental Congress (1928), 357, 360–361):

> That no rights be stipulated for aliens to hold real property within these States, this being utterly inadmissible by their several laws and policy; but where on the death of any person holding real estate within the territories of one of the contracting parties, such real estate would by their laws descend on a Subject or Citizen of the other were he not disqualified by alienage, there he shall be allowed a reasonable time to dispose of the same, and withdraw the proceeds without molestation.[30]

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[29] See n. 26, *supra*.

[30] When this instruction was presented to the Prussians, they expressed a preference for their original proposal, on the ground, *inter alia*, that the original had reciprocally exempted the nationals of the two countries from the *droit de detraction*, presumably without qualification. Letterbook of the Commissioners, 116 Papers of the Continental Congress, p. 166, MSS., Library of Congress.

The American Commissioners explained that the revision was attributable to the policy of the common law (2 *Diplomatic Correspondence of the United States, 1783–1789* (1833), 269, 274):

"By the laws of the United States, copied in this instance from those of England, aliens are incapable of holding real estate. When an estate of that nature descends to an alien, it passes on by escheat to the State; the policy of the United States does not permit the giving to the subjects of any other power a capacity to hold land within their limits, which was proposed by the project formerly delivered to Mr. Adams. But they are perfectly willing to relieve such persons from all loss on this account, by permitting them to sell the inheritance and withdraw the proceeds without any detraction."

Article X of the Treaty, as drafted by the Commissioners (Letter Book of the Commissioners, 116 Papers of the Continental Congress, pp. 66, 74, MSS., Library of Congress), reproduced the instruction from the Continental Congress as an exception to the clause providing for reciprocal inheritance of "personal goods," which thenceforth was limited to personalty. Article X provided, in substantially the same language as Article IV of the instant treaty of 1923, as follows (8 Stat. 84, 88):

> The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods; whether by testament or *ab intestato*, and may take possession thereof either by themselves or by others acting for them; and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. * * * And where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of detraction on the part of the government of the respective states.

It will be noted that the first sentence of this Article, which contains the clauses governing the disposal and inheritance of "personal goods", is based on the corresponding language

of the earlier Dutch and Swedish treaties (p. 42, notes 27, 28, *supra*) with the addition, in the clause governing disposal, of the phrase "within the jurisdiction of the other". This phrase appears here for the first time and nothing bearing on its intended significance has been found. Its function seems to have been to define more precisely than did the Dutch and Swedish treaties the case in which *disposition* of property required protection from the *droit d'aubaine, i.e.,* the case of disposition of property located in a country other than that of the citizenship of the owner. The phrase was unrelated to the problem of the extent to which rights of succession were to be granted, free from the *droit de detraction,* and cannot be said to have restricted such rights. Indeed, the terms of the real property clause, also newly-introduced, affirmatively suggest that the personal goods clause was intended to grant the right to inherit personal property from both alien and citizen decedents.

In the absence of the new clause explicitly dealing with real property, the reference to "personal goods" would have included both real and personal property. See p. 41, n. 26, *supra.* The real property clause was, therefore, a deliberate limitation on the scope of the rights to real property granted in the earlier treaties—a substitution of a right to proceeds for the right to take and hold title to real property. The substituted right clearly applied, however, to inheritance from both citizen and alien. The language explicitly comprehended inheritance from "any person holding real estate." It has never been suggested that this language does not guarantee the right to inherit from citizens [31] and

[31] The question has never been raised in the many cases construing the realty clause (see pp. 30–32, *supra*) and the opin-

such a suggestion would have been startling to the members of the Congress who, being familiar with the common law incapacity of the alien to own real property, no doubt had in mind only the cases of inheritance from citizen owners. See n. 30, *supra*.[32] The real property clause was, then, a limitation on what would otherwise have been the effect of the "personal goods" clause, a limitation, however, which broadly included both the cases of citizen and alien decedents. The Congress which drafted this limitation must, therefore, have believed that the clause for the inheritance of personal goods had the same effect and applied equally to inheritance from citizen and alien.

c. *The Treaties with the German States, 1840–1850.*—This understanding—that the personality clause applied to all heirs, whether of citizen or alien decedents—was repeatedly expressed during the period in the nineteenth century in which treaties incorporating Article X were being actively negotiated with a large number of countries. In the eighteen forties, similar treaties were negotiated by Henry Wheaton, then Minister to Prussia, with the German states of Bavaria, Hesse, Wurttemberg, Nassau and Saxony. See 4 Miller, *Treaties and Other International Acts of the United States of America* (1934), 546; Appendix C, p.

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ions frequently do not mention the citizenship of the decedent. In several cases, however, it appears that the decedent was an American citizen. *Colson* v. *Carlson*, 116 Kan. 593; *Goos* v. *Brocks*, 117 Neb. 750; *Opel* v. *Shoup*, 100 Ia. 407; *Techt* v. *Hughes*, 229 N.Y. 222, certiorari denied, 254 U.S. 643; *Dockstader* v. *Kershaw*, 4 Pennewill (Del.) 398.

[32] This incapacity had at that time been modified only by the treaties with France, The Netherlands and Sweden, under which aliens might have become the owners of real property by virtue of inheritance.

93. In these treaties the clauses relating to realty and personalty were for the first time set out in separate paragraphs.

In requesting authority to conclude these treaties, Mr. Wheaton described the purpose and desirability of reciprocal inheritance treaties as follows (Despatch, Wheaton to Legaré, June 14, 1843, 3 Despatches, Prussia, No. 226, MSS., Nat. Archives; see 4 Miller, *Treaties, etc., supra,* at 547–548):

> These odious prohibitions & taxes on the acquisition & transfer, by the citizens & subjects of one country of property situated in another, or on the sale of their property by the citizens & subjects of one country emigrating to another, which originated in the barbarous ages of the feudal system, when man was chained to the soil on which he grew, have been almost universally abolished by compact, & the common consent of most civilized nations. Almost every commercial Treaty, concluded by the United States with foreign Powers, contains a stipulation for that purpose. It is a matter of very considerable importance with respect to our intercourse with Germany, & the vast emigration constantly going on from this country to the U. States. In all the German States, where it is not otherwise provided by Treaty, a tax is levied on all property sold, & the proceeds of which are carried out of the country by Emigrants, which amounts, in most instances, to ten *per centum* on the capital thus transferred. That amount would consequently be gained to the U. States by the proposed stipulations; & I cannot perceive that we should lose more than we should gain by the free disposition of

property by testament or inheritance, on both sides; as, if there be many cases accruing of persons dying in the U. States, & leaving heirs in Germany, there are also probably as many cases of naturalized Germans, resident in the U. States, who are entitled to inherit the property of their relations deceased in Germany.

Mr. Wheaton speaks of the "odious prohibitions on the *acquisition* & transfer" by citizens of one country of property situated in another and states that almost every commercial treaty concluded by the United States contains a stipulation for abolishing these prohibitions and taxes. This statement, taken with his explanation of what we stood to lose or gain by such treaties, shows that he neither understood the existing treaties to limit the inheritance of personalty nor did he propose to conclude treaties containing such limitations. He made no distinction based on the citizenship of the decedent but rather referred to the "cases accruing of *persons* dying in the United States, & leaving heirs in Germany" as being balanced by the cases of "naturalized Germans, resident in the U. States, who are entitled to inherit the property of their *relations* deceased in Germany." Had the treaties not covered the case of inheritance by Americans from German citizens leaving personal estates in Germany (and the converse case, now before this Court), the major objective of the treaties would in large measure have not been realized. Mr. Wheaton referred to the "vast" emigration going on from the German states to the United States, and, significantly, in illustrating the case in which a resident of the United States would profit, he mentioned the naturalized German who might inherit from his relations in Germany. If such an heir could inherit personalty only from "relations" in Germany who were

American citizens, a class certainly not numerous, we would have profited little under the proposed treaties.

Nor did the Department of State, in responding to Mr. Wheaton, make nice distinctions with regard to the heirs to be benefited. He was instructed to take as his "general guide" the treaties with Prussa, the Hanseatic Republics and Hanover, the pertinent clauses of which are substantially identical with Article IV of the instant treaty of 1923. The object of the treaties was stated to be "the removal of all obstructions * * * to the withdrawal from the one country, by the citizens or subjects of the other, of any property which may have been transferred to them by gift, contract, or will—or which they may have inherited *ab intestato*." 4 Miller, *Treaties, etc., supra,* 546, 548.

d. *Negotiations for the Treaty of 1848 with Austria.*—In Article XI of the Treaty of August 27, 1829, with Austria (8 Stat. 398, 401),[33] the form of the earlier treaties with Sweden and Norway was followed and realty and personalty were treated together, as "personal goods," in a single provision much like the instant paragraph with respect to personalty. In 1847 a revised extension of this treaty was negotiated, with the provisions of the Prussian, Wurttemberg and other German treaties as a model. Treaty of May 8, 1848, 9 Stat. 944; see 5 Miller, *Treaties, etc., supra,* 453, 456, 460.

[33] "The citizens or subjects of each party shall have power to dispose of their personal goods, within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being citizens or subjects of the other party, shall succeed to their personal goods, whether by testament, or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues, taxes or charges, only, as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

In the course of the negotiations, both parties commented on Article XI of the earlier treaty in a manner showing that they understood it to provide for inheritance without distinction based on the citizenship of the decedent. The Austrian Government suggested that a proposed exemption, in the new treaty, from the *droit d'aubaine* and the *droit de detraction* not affect the restrictions imposed by local Austrian authorities. Secretary of State Buchanan responded in a letter dated July 19, 1847, pointing out that Article XI of the existing treaty already abolished these rights, without exception (5 Miller, *Treaties, etc.*, 457):

> The 11th Article of the existing Treaty of the 27th August 1829, provides fully and satisfactorily, throughout all the States of both parties, for the abolition of the droit d'aubaine and all discriminating taxes, so far as personal property is concerned. Although this Article is silent in regard to real estate or landed property [34], yet it is manifest that the same rule of justice ought to be applied to both kinds of property. Besides, the devise or descent of a real estate in Hungary to a citizen of the United States, will probably be an event of rare occurrence.

In compliance with this objection, the Austrian Charge d'Affaires abandoned his government's proposal and drafted an article to make explicit the reciprocal exemption. See 5 Miller, *Treaties, etc., supra,* 458. The draft provided (*ibid.*):

> The stipulation, contained in the XIth Article of the Treaty of Commerce and

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[34] Secretary Buchanan apparently believed that the phrase "personal goods" in Article XI did not comprehend real property. See p. 41, n. 26, *supra.*

> Navigation of the 27th August 1829,—that the subjects or citizens of both contracting parties shall have power to take possession and dispose, at their will, of any inheritance mutually accruing, paying such dues, taxes or charges only, as the inhabitants of the country, wherein the said goods are, shall be subject to pay in like cases,—shall be applied to all cases of exportation of property from Austria to the United States of America and vice versa, in whatever way the exportation may take place, in consequence of the emigration of the owner, or of donation, or as marriage portion, or in any other way.

Apparently on Secretary Buchanan's motion, the reason for which does not appear, this Article was not included in the final treaty. See 5 Miller, *Treaties, etc., supra,* 459–460. The Secretary may have regarded it as unnecessary in view of the repetition of the former Article XI as Article I of the new treaty, and the insertion of a new Article II, which deals with realty in the language of the Prussian treaties and the instant treaty. 9 Stat 944. Plainly, however, this exchange of correspondence is a construction of Article XI of the 1829 Treaty as providing for the acquisition by the heir of any inheritance falling due to him without distinction based on the citizenship of the ancestor or donor. Thus both parties deliberately agreed upon a new treaty which they took to mean that the citizens of each should "have power to take possession and dispose, at their will, of any inheritance mutually accruing."

2. *The decision in Frederickson* v. *Louisiana.*—It is clear, then, that in 1860, at the time of the decision of the *Frederickson* case, the treaty provisions under discussion, including specifically the treaty with Wurttemberg, had consistently been understood as unqualifiedly

permitting the foreign heir to succeed to his inheritance or the proceeds thereof. This Court, not informed [35] of the history of the treaty provisions, adopted a contrary construction.

The testator in *Frederickson* v. *Louisiana* was a naturalized citizen of the United States, resident in Louisiana, and his legatees were citizens and residents of Wurttemberg. A Louisiana statute imposed a succession tax of 10 per cent on legatees not domiciled in Louisiana and not citizens of other states of the United States. Sec. 7, Act 315, 1855, Acts La., pp. 398, 399. The question was whether Article III of the Treaty of April 10, 1844, with Wurttemberg prevented application of the tax to the alien legatees. Article III provided (8 Stat. 588, 590):

> The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies, shall be liable to pay in like cases.

This Court, affirming the judgment of the Supreme Court of Louisiana, held that the Louisiana statute did not discriminate between citizens of Louisiana and aliens, but rather applied to legatees domiciled abroad without regard to their citizenship. The legatees, were, therefore, regarded as subject only to such duties as were

[35] The briefs, which are on file with the Court, contain no reference to the history of the provision.

exacted from citizens under the same circumstances. The Court, speaking through Mr. Justice Campbell, went on to state that the treaty was inapplicable to estates of citizens residing at home (23 How. 445, 447–448):

> * * * But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting Powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting Powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the Supreme Court of Louisiana.

It is submitted that the historical material discussed above fully demonstrates the error of this decision and therefore of the cases which followed it (p. 38, *supra*). The error is confirmed by the severe criticism of the case by the Wurttemberg Government and by the position thereafter taken by the Department of State with respect to other treaties, particularly the Treaty of 1899 with Great Britain.

a. *The Wurttemberg Protest.*—The Louisiana tax upheld in the *Fredrickson* case closely resembled the *droit de detraction,* one of the civil law taxes which these treaties had intended to abolish reciprocally, and it is small wonder that the Government of Wurttemberg filed a vigorous diplomatic protest against the decision. In a letter dated January 14, 1868, to Secretary of State Seward, the Consul-General of Wurttemberg, Leopold Bierwith, severely criticized the decision as contrary to the plain meaning of the treaty and called attention to the contrary interpretation followed by the Wurttemberg Government (11 Foreign Consuls in the United States, MSS., Nat. Archives):

> It would seem to be obvious that the heirs, legatees, and donees of citizens of the contracting parties are as fully under the provisions of this article as such citizens themselves, and that, to avoid doing violence to the terms of the compact, it must necessarily be held to provide that the heirs, legatees, and donees of citizens of each of the contracting parties, if themselves such citizens, shall succeed to the personal property of their ancestors, testators, and donors, paying such duties only as the inhabitants of the country where the property lies, shall be liable to pay in like cases. In other words, it would seem to have been unmistakably agreed that every subject of His Majesty is entitled to be placed on the same footing with an inhabitant of the United States; if he becomes the heir, legatee, or donee of a citizen of either of the contracting parties, in respect of personal property within the United States. And it would follow that a subject of His Majesty, answering to these conditions, is exempt from any tax from which any

inhabitant in the United States is exempt in like cases.

The authorities of Wurttemberg, judicial as well as executive and legislative, have invariably adhered to this construction sustained as it is by the context of the treaty, which in its second article [relating to realty] declares that * * *

* * * * *

Under this reading of the treaty, the personal property of Wurttembergers descending to persons belonging to the United States, has always been exempt from the payment of duties of detraction, whether situate in the one country or in the other. * * * It (the treaty) was interpreted as having been made rather for the benefit of the living than for that of the dead; rather for the advantage of the heirs, legatees, and donees, than for that of the decedents and donors; and if the former were intended to be relieved from the payment of duties of detraction, it could make no difference to them, whether the foreign country whence their inheritance came, was or was not the native country of the intestate from whom they derived it.

The succeeding Secretary, Hamilton Fish, replied that his Government was bound by the decision of the Supreme Court and suggested, as had his predecessor, that a new treaty be concluded to express the views of the Wurttemberg Government.[36]

[36] Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U.S. 140, MSS., Nat. Archives; Instruction, Seward to Bancroft, Minister to Prussia, Aug. 18, 1868, 15 Instructions to Prussia, No. 75, p. 2, MSS., Nat. Archives. See Bancroft Davis, *Notes upon Treaties of the United States of America and other powers* (1873), 159.

A proposed new clause was drafted by the Wurttemberg Government and its substance was agreed to by Mr. Fish,[37] but the inclusion of Wurttemberg in the German Empire in 1871 apparently ended the matter.[38]

b. *Constructions by the Department of State*—i. *The Swiss and Russian Treaties.*—After this Court's decision in the *Frederickson* case, the Department of State took the view we advance in this brief in connection with Article V of the Treaty of November 25, 1850, with

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[37] Despatch, Bancroft to Fish, Nov. 29, 1869, 16 Despatches, Prussia, No. 52, MSS., Nat. Archives; Instructions, Fish to Bancroft, Dec. 21, 1869, Jan. 24, 1871, 15 Instructions to Prussia, No. 168, p. 99, No. 193, p. 121, MSS., Nat. Archives. The proposed clause provided (Despatch, Bancroft to Fish, *supra*):

"The citizens of each of the contracting parties, where an inheritance falls to them ab intestate or by testament or donation in the personal property of a citizen of the other contracting party, shall succeed to the said personal property in all cases without regard to the country in which such testamentary disposition or donation may have been made and in whichever of the two countries the personal property so falling to them by intestacy or by will or donation may lie, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

[38] It may also be noted that in 1868 the Louisiana court held that the treaty of 1845 with Bavaria (9 Stat. 826, 827), identical with the Wurttemberg treaty, exempted Bavarian heirs from the tax applied in the *Frederickson* case. *Succession of Crusius*, 19 La. Ann. 369. The opinion neither cites the *Frederickson* case nor does it reveal the citizenship of the decedent. Secretary of State Fish, however, pointed out to the Wurttemberg Government that this decision might mean that the Louisiana authorities would no longer construe the treaty as they had in *Frederickson's* case. Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U.S. 140, MSS., Nat. Archives.

Switzerland (11 Stat. 587, 590).[39] That Article is substantially identical with the personalty clauses of both the Wurttemberg Treaty and the instant treaty of 1923. In 1868, a dispute arose concerning the inheritance by a United States citizen of the personal property of his Swiss maternal grandfather, located in the canton of Aargau. The cantonal authorities had refused to allow the American's claim on the ground that he was not a legitimate heir since his mother, a Swiss citizen, had not married in accordance with Swiss laws. In submitting the dispute to the High Federal Council of Switzerland, the American Minister at Berne argued that the question of the legitimacy of the claimant should be determined by the law of the United States and that, as an American citizen, the claimant "is justly entitled under the treaty to succeed to the property in question, and to take possession thereof by the attorney duly appointed for that purpose." *Diplomatic Correspondence of the United States, 1868,* Part II, 194, 196. The Council held that United States law governed the question of legitimacy but also observed that by virtue of the treaty of 1850 "an American citizen has the right, in case of successions, to be treated as a Swiss." While the major issue was the legitimacy of the American claimant, our minister and the Swiss authorities agreed that, assuming the claimant's legitimacy, the treaty put American citizen heirs on the same footing with Swiss heirs, and that they could therefore inherit from Swiss citizens. *Ibid.,* 197.

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[39] "The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successor, being citizens of the other party, shall succeed to the said property or inherit it * * *."

When in the next decade the same question arose, this Government again interpreted the treaty provision in this manner.[40] In 1880 it appeared that local Swiss authorities had detained personal property left by a Swiss to a naturalized American citizen of Swiss origin on the ground that since the claimant had not obtained the consent of the canton to his naturalization, his status as an American citizen would not be recognized. In instructing our minister at Berne to press the claim of the American heir, Secretary Evarts said (*Foreign Relations of the United States, 1880,* 952, 953):

> Again, the fifth article [of the 1850 treaty] stipulate in substance that the heirs of a Swiss decedent, being citizens of the United States, whether native or naturalized, shall inherit and dispose of the property of such decedent at their pleasure.

And in 1877 the Secretary took the same position, under the similar treaty with Russia (8 Stat. 444, 448), with respect to the rights of Russian heirs in the United States. In an instruction to our Minister to Russia, he stated that under Article X of our treaty of December 18, 1832, with that country, "Russian subjects may inherit the personal estate of decedents in the United States and may take possession thereof, by themselves or by others." 4 Moore, *Digest of International Law* (1906), 6.

ii. *The British Treaty of 1899.*—The Louisiana tax statute applied in the *Frederickson*

[40] These constructions of the Swiss treaty were judicially confirmed in 1883 in *Jost* v. *Jost*, 1 Mackey (12 D.C.) 487, in which the Supreme Court of the District of Columbia held that under Article V of the 1850 treaty, Swiss heirs could inherit the personal estate of an American citizen decedent. The other state cases reaching the same result were decided in the present century. See *supra*, p. 39, n. 23.

case was repealed in 1877[41] and, as has been shown, for the remainder of the century all the rulings were in support of the right under these treaties of an alien heir to inherit personal property from a citizen decedent. In 1894, however, the Louisiana statute was reenacted[42] and during its four-year life[43] it precipitated the negotiations for what became the Treaty of March 2, 1899, with Great Britain on the subject of reciprocal inheritance rights. 31 Stat., 1939. The negotiations for this treaty show that although the language used was that of the Wurttemberg and Prussian treaties, the treaty was deliberately intended to override the Louisiana statute. The construction placed by the parties on the personalty clause is, therefore, additional evidence that the clause should not be taken to exclude the case of the alien inheriting personal property in this country from an American citizen decedent.

On September 24, 1895, Sir Julian Pauncefote, the British Ambassador in Washington, wrote to Secretary of State Olney as follows (125 Notes from Great Britain, MSS., Nat. Archives):

> A recent enactment of the State Legislature of Louisiana imposing a 10 p/c duty on property inherited by foreigners resident abroad, has drawn the attention of Her Majesty's Government to the present position of British or American subjects, as the case may be, succeeding to property situated in the United States or Great Britain, respectively. There are no existing Treaty arrangements between

[41] Act 86, 1877 La. Acts 125.

[42] Act 130, 1894 La. Acts 165.

[43] The statute was declared unconstitutional in 1898 as in violation of the provision in the Louisiana Constitution requiring that revenue bills originate in the lower House. *Succession of Sala*, 50 La. Ann. 1009. It was not thereafter reenacted.

> the two countries for protecting this class of persons from differential legislation directed against them.
>
> * * * * *
>
> I am accordingly to ascertain whether the United States Government would be willing to sign a short convention, declaring:
>
> (1) that no greater charges shall be imposed in the way of succession, probate or administration duties on real or personal property in the United States inherited by British subjects, whether domiciled within the union or not, than are imposed on property inherited by American citizens * * * with provisions securing reciprocal advantage in Great Britain * * * to citizens of the United States.

Although such records of the negotiations as have been preserved disclose no further reference to the Louisiana statute, it is clear that the provisions of the treaty relating to personalty were based on a draft prepared by this Government in response to Sir Julian's letter.[44] Both

[44] On January 18, 1896, Sir Julian wrote to Secretary Olney referring to the hardships imposed upon British subjects by the laws in force in the United States prohibiting the ownership of real property by aliens. He suggested the conclusion of a treaty granting most-favored-nation privileges with respect to "the tenure, disposition and transmission of real property." 126 Notes from Great Britain, MSS., Nat. Archives. On May 20, 1896, he wrote a third letter, referring to his two earlier letters and requesting the decision of the Government of the United States in regard to the proposals made in the letters. *Ibid.* The first draft of the convention was submitted to the British Ambassador by Secretary of State John Hay on December 9, 1898. 24 Notes to Great Britain 541, MSS., Nat. Archives. Various changes were recommended by the British Foreign Office. Letter, Pauncefote to Hay, 130 Notes from Great Britain, Feb. 16, 1899, MSS., Nat. Archives. These were incorporated. The draft of Article II appeared substantially in what became its final form, the only change being the substitution of the word "territories" for the proposed word "States."

the draft and the final treaty relate solely to reciprocal inheritance rights and the representation of decedents by consuls of their nationality. Article I provides for the inheritance of real property, in the language of the Prussian and Wurttemberg treaties. Article II, dealing with personal property, also follows the earlier treaties (31 Stat. 1939):

> The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

There is no evidence that the State Department representatives who drafted Article II, or the British representatives who agreed to it, were mindful of the decision in *Frederickson* v. *Louisiana*. Their failure to vary the treaty language explicitly to avert the ruling of that case suggests that they were not. Their adoption of the language of Article II without substantial change from the Wurttemberg form,[45]

[45] The only language in Article II not found in the earlier treaties is the description of the heirs as "whether resident or non-resident." This new phrase merely emphasized the application of the treaty to British citizens wherever resident and could not of itself have been meant to overrule the *Frederickson* decision. If, however, the presence of this phrase is believed to make the *Frederickson* decision inapplicable, that conclusion applies as well to the instant case, since Article IV of the instant treaty with Germany likewise contains such language.

therefore, demonstrates that they held a view with respect to the treaty language opposite to that expressed in the *Frederickson* opinion.

The Louisiana statute which suggested the need for a treaty was understood, according to the British Ambassador's letter, as referring to inheritance by "foreigners resident abroad." That statute had directed his concern to the position of "British or American subjects, as the case may be, succeeding to property situate in the United States or Great Britain, respectively." No existing treaty between the countries, he pointed out, protected "this class of persons from differential legislation directed against them." And in his specific proposal for a clause respecting taxes on succession (broadened in the treaty to apply as well to the privilege of succession), the Ambassador referred to real or personal property in the United States "inherited by British subjects, whether domiciled with the union or not." Plainly, the British Ambassador was making no distinction among the class of British aliens who might succeed to property in the United States. He was seeking a treaty under which property in this country would descend to British citizens without regard to such factors as the citizenship of the decedent. And this Government, having presented a draft treaty to accomplish this purpose, should be held to have acquiesced in the British understanding. *Cf. Hauenstein* v. *Lynham,* 100 U.S. 483, 486–487.

Article IV of the Treaty of 1923 with Germany should be similarly construed.

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